At the outset of the trial of appellee's case, the Honorable David N. Savitt explicitly directed the trial prosecutor, Ms. Foulkes, to not only fulfill her ordinary obligations to disclose exculpatory evidence, but to go beyond that and to turn over to the defense evidence that could be "peripherally" construed as exculpatory:

> Any evidence that is exculpatory to the defendant in this case, the Commonwealth is directed to make available to counsel. In determining what is exculpatory, I would ask that you construe it liberally, even peripherally so and that does not mean it is admissible. It is simply something to show Mr. Panarella. It is important you have everything."

N.T. 1/6/1986 at 105.

Ms. Foulkes, however, did not comply with the Judge's directive. Instead of showing Mr. Panarella "everything," Ms. Foulkes did not share evidence favorable to appellee which was squarely within her possession. She did not inform Mr. Panarella that she knew Mr. Norwood had groped 16-year old Ronald House "on privates"[1]; that Reverend Poindexter knew that parishioners lodged "complaints" regarding Mr. Norwood's sexual impropriety[2]; that as part of Draper's plea agreement, she would write to the Pennsylvania Board of Probation & Parole (Parole Board) on his behalf, detailing his cooperation with the government[3]; and that Mamie Norwood had informed her that after seeing appellee's photograph in the newspaper she remembered he was the one on her porch the day her husband disappeared.[4] Additionally, Ms. Foulkes failed to locate and turn over exculpatory evidence located in the police files. She did not provide a June 1984 Activity Sheet, in

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[1] N.T. 9/20/2012 (P.M.) at 120-23; see Attachment D, marked as Exhibit Court-2 before this Court, page 2.

[2] See Attachment Q.

[3] See Attachment P, marked as P-15 in the PCRA hearing before this Court.

[4] N.T. 1/14/1986 at 120; see Attachment R, which was not marked as an exhibit in the PCRA hearing before this Court. Prior to the evidentiary hearing on September 20, 2012, appellee's counsel reviewed the contents of the District Attorney's trial boxes for less than six hours. Given the tight deadline imposed by the fact that appellee's execution was scheduled for October 3, 2012, a complete review of the files was not practicable for anyone in the time allotted. In the interests of concluding its review, this Court again went through the contents of the files after the completion of the evidentiary hearing. Again, this Court cautions that, due to the hurried posture of the proceedings, neither of the parties has seen this document.

which Mrs. Norwood recounted a night where she woke up and saw both her husband and a young, slim male in the house, and then watched from the window as they got into Mr. Norwood's car and drove off.[5] That same activity sheet also detailed a complaint from the mother of a 17-year old parishioner about Mr. Norwood propositioning the boy for sex. Instead of following Judge Savitt's order to get "everything" to Mr. Panarella, Ms. Foulkes did not do so, even though the discovery packet containing the statements of Mrs. Norwood and Reverend Poindexter did not include the portions of their statements directly and indirectly substantiating Mr. Norwood's homosexual ephebophilia.

There is a common thread tying together the evidence that the trial prosecutor failed to disclose: almost every piece of evidence strengthens the inference that Mr. Norwood was sexually inappropriate with teenage boys, and had some semblance of a relationship with appellee. Not only does that pattern of non-disclosure violate appellee's due process rights under Brady, as well as the mandatory disclosure provision of the Pennsylvania Rules of Criminal Procedure[6], but it also calls into question the trial prosecutor's intent as the architect of this prosecution. This Court found that, based on her decisions to disregard Judge Savitt's directive and based on her testimony at the September 2012 PCRA evidentiary hearing, Ms. Foulkes exhibited "gamesmanship," choosing not to disclose evidence that would have supported the contention that appellee had been the victim of Mr. Norwood's sexual advances.

In the Herbert Hamilton case, for which Ms. Foulkes had prosecuted appellee in early 1985 – nearly one year before prosecuting him in the Amos Norwood case – Ms. Foulkes aggressively sought a first degree murder conviction and imposition of the death penalty. She described the

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[5] See Attachment E, marked as P-24 in the PCRA hearing before this Court.

[6] Pa.R.Crim.P. 305(B)(1), now codified at 573(B)(1), controlled at the time of appellee's trial. Rule 305(B)(1)(a) required that the Commonwealth disclose material evidence in the possession of the Commonwealth's attorney. Rule 305(B)(1)(d) mandated disclosure of "circumstances and results of any identification of the defendant by voice, photograph, or in-person identification."

Hamilton prosecution to this Court as "an appropriate first-degree case." N.T. 9/20/2012 (A.M.) at 10, 80. This Court concurs that it was, in fact, an appropriate case for first degree murder. However, the jury returned a verdict of third degree murder. The trial judge, the Honorable Alfred F. Sabo, Jr., himself commented at appellee's sentencing that the verdict did not match up with the evidence presented: "This was a most horrible crime. How they came to third-degree, the intent to do bodily harm but not to kill, is beyond me." N.T. 6/3/1985 at 19. Despite the trial court's admission that the third degree verdict shocked him, Ms. Foulkes testified in the hearing before this Court that "[t]here was certainly a lot of issues [sic] here in any event and I didn't think it was an inappropriate verdict." N.T. 9/20/2012 (A.M.) at 80. Ms. Foulkes stated that she "didn't mind what the – what the verdict was." Id. And again later in the hearing, Ms. Foulkes reiterated that position:

> I didn't care what the verdict was as long as the jury considered all the evidence. I presented it to the best of my ability. If this had not been a death penalty, if the jury had not come back with the death penalty, that would not have worried me. If the juror [sic] had come back with third degree in the second case, that would not have bothered me.

N.T. 9/20/2012 (P.M.) at 95.

However, this Court did not find that testimony credible. This Court found that the third degree verdict in the Hamilton case colored Ms. Foulkes' decisions when she prosecuted appellee for the murder of Amos Norwood. First, Ms. Foulkes identified what she believed to be the reason that the jury returned a "compromised" verdict.[7] And then she attempted to eliminate evidence which caused the "compromised" verdict from being presented to the jury. In the hearing before this Court, Ms. Foulkes hypothesized that "a lot of issues" in the Hamilton case explained the jury's decision to return an inconsistent verdict. When asked what she meant by "issues," Ms. Foulkes responded, "Well, there were these sexual overtones and relationships and what have-you." N.T. 9/20/2012 (A.M.) at 80. The "sexual overtones and relationships," which she credited with leading

[7] N.T. 9/20/2012 (A.M.) at 79.

the jury to reach a compromise verdict, revolved around the fact that a middle-aged man may have been paying appellee, still in his teens, for sex.

In her opening statement in the Hamilton case, Ms. Foulkes had stated:

> However, Terrance Williams also had a secret life, and that secret life was his engagement in making money by hustling homosexuals for favors, for money, for clothing, for anything of value to him, and Herbert Hamilton was one of a number of people that Terrance Williams engaged in this.
>
> Herb Hamilton was not the only individual with whom Terrance Williams engaged in this kind of enterprise. You'll hear from Marc Draper that Terrance Williams had told him that he on other occasions sought to earn money, make money, what have you, by having homosexual acts with various individuals.

N.T. 2/14/1985 at 23.

And, during the trial of the Hamilton case, Ms. Foulkes represented to the Court, during her direct examination of Draper, that appellee was sexually involved with multiple older men.

> ADA FOULKES: Let me ask you this: do you know on how many occasions he had engaged in this kind of activity, that is, in exchange for sexual favors for money or for clothing or something of that nature –
> MR. GALLAGHER: Objection.
> ADA FOULKES: – based on what he told you?
> MR. GALLAGHER: Objection.
> THE COURT: Could I see you? Where are you trying to go? I don't understand your question.
> ADA FOULKES: That we're not talking about one person, we're talking about several different people, not just one individual. The purpose of the testimony is to indicate that Herb Hamilton is not the only person that he has ever engaged in this kind of activity with.

N.T. 2/20/1985 at 350-51.

> ADA FOULKES: All right. Now, on the other occasions that Terry discussed how he obtained money, had Terry indicated to you that with other individuals from whom he obtained money or clothing, that he engaged in sexual relations?
> MR. DRAPER: Yes.

Id. at 354.

Ms. Foulkes admitted to this Court that her knowledge of appellee's sexual past created an obvious implication that his relationship with Amos Norwood was substantially similar to his relationship with Herbert Hamilton. She testified, "Did I suspect that there was a sexual connection

between them [appellee and Amos Norwood]? Yes I did." N.T. 9/20/2012 (A.M.) at 110. But Ms. Foulkes made certain that the jury did not see that sexual connection. When confronted about the existence of evidence supporting *her own* suspicion that Mr. Norwood had been sexually inappropriate with appellee at the PCRA hearing before this Court, Ms. Foulkes grossly misrepresented the evidence in the government's files. She stated that she "had not a scintilla of evidence that Mr. Williams had actually had any sexual relationship with Mr. Norwood." N.T. 9/20/2012 (A.M.) at 135. She told this Court that all witnesses who were asked about Mr. Norwood's homosexual tendencies "all said no." N.T. 9/20/2012 (P.M.) at 99. Specifically, Ms. Foulkes stated that she "had no information from Reverend Poindexter at the time there was anything untoward about any conduct in the church." Id. at 106.

This, however, the Court found to be absolutely contrary to the evidence which Ms. Foulkes had in hand. Hard evidence uncovered during the review of the government's trial files *directly* contradicted Ms. Foulkes' assertions. A note in Ms. Foulkes' own handwriting[4] recounted a specific instance in which Ronald House had been molested by Mr. Norwood.

> THE COURT: Does that refresh your recollection at all? It's a Ms. House and her son Ronald who is 16 years old. He had been in a play and was touched on his private [sic] and then it has some notation, I think in your handwriting, "Heard from others about possible incidents."
> MS. FOULKES: "Touched on privates, I don't do that, nobody would have to know" – I didn't remember this, but yes, there must have been this one report from a Ms. House.
> . . .
> So when it goes onto [sic] the part that you've highlighted, it says, "Son in play, Ronald, touched on privates, I don't do that, nobody would have to know, brought boy home and asked him not to say anything, and then he stopped coming to church, disappeared," and it says, "Never verified it, and 29 years, first time," and then it says at the bottom, "Heard from others about possible incidents." That must have been Ms. House.

Id. at 121-22.

Additionally, a police activity sheet in the government's trial file revealed that Detective Daniel Bennett had uncovered information about Mr. Norwood being "linked to possible

[4] See Attachment D, marked as Exhibit Court-2 in the PCRA hearing before this Court.

homosexual activities."[9] A handwritten note found in the District Attorney's Office's trial file demonstrates that Ms. Foulkes knew that Detective Bennett's investigation produced specific information about Mr. Norwood's sexual involvement with parishioners at his church.[10]

Ms. Foulkes' statements to this Court about the dearth of evidence regarding Mr. Norwood's homosexuality weighed heavily on her credibility considering the evidence found in the government's trial files. This Court was unable to believe that she "had not a scintilla of evidence" about a sexual relationship between appellee and Mr. Norwood. This Court was constrained to find that Ms. Foulkes intentionally rooted out information which strengthened the inference of a homosexual connection between appellee and Amos Norwood from being presented to the jury by the defense.

This Court found that Ms. Foulkes chose not to disclose that evidence in an attempt to cure the "issues" that had led to a compromise verdict in the Hamilton case, and to keep as much as possible regarding those "issues" out of the trial of the Norwood case.[11] And after having failed to disclose this evidence, Ms. Foulkes then made a closing argument that contradicted her own belief

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[9] See Attachment U, which was marked as Exhibit P-28 in the PCRA hearing before this Court.

[10] The note in Ms. Foulkes' handwriting, which was not introduced as an exhibit at the PCRA evidentiary hearing, as it was not uncovered until this Court conducted a final review of the government's trial files following the conclusion of the evidentiary hearing, reads: "D. Bennett talks to Rev. Poindexter who advises of other complaints by parishioners re. dec'd's homosexuality." (See Attachment Q). This note suggests that Ms. Foulkes not only knew about Mr. Norwood's sexual orientation, but that she also knew of specific examples of Mr. Norwood's homosexual ephebophilia. Thus, this note is yet another piece of evidence corroborating this Court's conclusion that Ms. Foulkes was not credible when she said that all witnesses asked about Mr. Norwood's interest in teenage boys "said no." Again, this Court cautions that, due to the hurried posture of the proceedings, neither of the parties has seen this latter document.

[11] Not only did Ms. Foulkes keep these "issues" from being presented to the empanelled jury, but she also chose the jury with an eye towards weeding out jurors who might have been sympathetic to victims of sexual impropriety. Ms. Foulkes testified before this Court that a "second reason" she struck venireperson Alberta White was because Ms. White's "son had been sexually assaulted and one of the things that I look for in jurors is whether or not they would be emotionally able to separate out their personal experiences from issues that might arise during trial." N.T. 9/20/2012 (A.M.) at 131. Ms. Foulkes had also testified about striking Ms. White as part of the Batson claim raised in the 1995 PCRA petition. N.T. 4/16/1998 at 712.

about the true nature of appellee's relationship with Amos Norwood.[12] When asked by this Court whether it occurred to her, "maybe he's [appellee's] doing Norwood and getting money," Ms. Foulkes admitted, "Of course it occurred to me." Id. at 109. Nonetheless, she argued:

> Now ladies and gentlemen, you know the horrible circumstances of the death of Amos Norwood. You know that the defendant, Terrance Williams, for no other reason but that a kind man offered him a ride home, that he and another man tied him up in the darkness of a cemetery, and beat him to death, squashed him like a bug that you might be irritated with against a windshield, beat him with two blunt instruments.

N.T. 2/3/1986 at 1873.

The major difference between the Hamilton and Norwood cases is that evidence of a sexual relationship between the middle-aged victim and appellee was presented to the jury in the first, but not in the second. The Court is quite mindful that Ms. Foulkes had no duty to do the defense's job for them, and she had the right to present a different theory of the case that focused on a robbery of the victim and not on a relationship that existed or might have existed between the victim and appellee. However, she did have a duty to provide the defense with that evidence, because it was exculpatory and "material." The fact that a portion of Ms. Foulkes' penalty phase closing argument – the culmination of prosecuting appellee for both the Hamilton and Norwood murders – focused on an aspect of the evidence that could have been rebutted by the withheld information more than suggests that Ms. Foulkes was aware of the significance of what was brushed under the rug. This Court concluded that intentionally rooting that evidence out of the Norwood case in order to secure

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[12] During the penalty phase of the Norwood case, Ms. Foulkes called ADA Jeffrey Kolansky to testify about appellee's conviction for the burglary and robbery of Don and Hilda Dorfman. During her direct examination of Mr. Kolansky, Ms. Foulkes elicited details of the facts underlying that conviction. She asked Mr. Kolansky about the time of the offense, the nature of the offense, the type of weapon used, and how that weapon was used on Mr. and Mrs. Dorfman. N.T. 2/3/1986 at 1821-23. However, when Ms. Foulkes called Detective Lawrence Gerrard to testify about appellee's conviction for third degree murder in the killing of Herbert Hamilton, she shied away from asking questions about the facts of the offense. Besides basic information like the location, date and age of the victim, the only other question Ms. Foulkes asked was about the cause of death. Id. at 1826-28. The fact that Ms. Foulkes chose to present to the jury in the Norwood case some details of the Dorfman robbery, but not to do so with respect to the Hamilton killing is yet another indication that Ms. Foulkes did not want the jury in the Norwood case to learn about what she felt had been "issues" in the Hamilton case.

a death penalty sentence amounted to "gamesmanship." As in Thiel,[13] where the government failed to disclose information and then "used [it] skillfully in rebuttal," Ms. Foulkes failed to disclose her knowledge of evidence of Norwood's sexual improprieties with teenage boys, as well as her belief that Norwood was sexually involved with appellee.[14] And, then, she skillfully used the non-disclosure of that evidence in her penalty-phase closing argument, seizing the opportunity to characterize Amos Norwood as a sympathetic victim who had merely offered appellee a ride home. In Thiel, as noted in the body of this Opinion, our Superior Court labeled the prosecutor's gamesmanship "trial by ambush." Here, Ms. Foulkes' decisions constituted "penalty phase by ambush." Accordingly, this Court considered Ms. Foulkes' conduct as part of its decision to grant a new penalty phase hearing.

In addition, this Court found other behavior of Ms. Foulkes during the course of the Norwood trial to weigh into the finding that she was not credible when she said that she "didn't care what the verdict was as long as the jury considered all the evidence," which she maintained that she presented "to the best of [her] ability." N.T. 9/20/2012 (P.M.) at 95. Instead of following Judge Savitt's directive to make sure that Mr. Panarella had "everything," which would thereby have enabled the jury to consider "all the evidence," Ms. Foulkes withheld evidence that as part of Draper's deal to plead guilty to second degree murder, she promised to write a letter on his behalf to the Parole Board. Ms. Foulkes elicited testimony from Draper indicating that his *only* agreement with the Commonwealth was that in exchange for his truthful testimony against appellee, he would

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[13] 470 A.2d at 149.

[14] A review of Ms. Foulkes' notes prior to and during witness preps shows that she was an extremely thorough and meticulous prosecutor who did not want any surprises. When preparing for trial she had no way of knowing that appellee was going to testify that he had just met Mr. Norwood on the day of the killing. Everything in her possession pointed to the opposite. Appellee was admitted into Mr. Norwood's home, where he stayed for approximately 20 minutes. Shortly thereafter Mr. Norwood stopped and picked appellee up and drove off with him for a few minutes. Additionally, Ronald Rucker, who was called as a Commonwealth witness, had noted in his July 19, 1984 police interview that "Terry said Amos was a homosexual and was the type to pay people." See Attachment N.

plead guilty to second degree murder, robbery and conspiracy for the murder of Amos Norwood.

N.T. 9/20/2012 (A.M.) at 165-66.

> ADA FOULKES: Now, when an agreement was made between your attorney, yourself and the Commonwealth, was an agreement that was signed, which you have seen, made between the Commonwealth and your attorney at the time, Mr. Kenneth Dixon?
> MR. DRAPER: Yes.
> ADA FOULKES: Have you seen that agreement?
> MR. DRAPER: Yes.
> ADA FOULKES: Could I have this document marked C-18? Your Honor, if I may substitute a copy for the exhibit, so I may retain the copy that we have marked.
> THE COURT: Sure.
> ADA FOULKES: Is that agreed, counsel?
> MR. PANARELLA: Yes.
> ADA FOULKES: Mr. Draper, do you recognize the document that's marked C-18?
> MR. DRAPER: Yes.
> ADA FOULKES: Is that the agreement between you and your attorney and the Commonwealth of Pennsylvania in reference to this case?
> MR. DRAPER: Yes.
> ADA FOULKES: Is it dated August 16, 1984?
> MR. DRAPER: Yes.
> ADA FOULKES: Does it read as follows: "This letter will confirm the agreement entered into this date between the Commonwealth -
>
> [Discussion at sidebar, after which Ms. Foulkes read the August 16, 1984 letter to the jury.]
>
> ADA FOULKES: Was that the agreement that you understood and entered into with the Commonwealth in this matter?
> MR. DRAPER: Yes.

N.T. 1/22/1986 at 660-63.

On cross-examination, Mr. Panarella followed up on Ms. Foulkes' questioning regarding Draper's "deal" with the Commonwealth. Draper's bolded responses to Mr. Panarella's pointed questions were false:

> MR. PANARELLA: You have a deal [c]orrect?
> MR. DRAPER: Yes.
> MR. PANARELLA: And that deal, at some point, was put down in a writing; is that correct?
> MR. DRAPER: Yes.
> **MR. PANARELLA: Can I have C-18. Was there anything more agreed upon between you, your attorney, your family and the police or the District Attorney's office other than what is embodied within this document?**
> **MR. DRAPER: No.**
> **MR. PANARELLA: Nothing at all?**

MR. DRAPER: No.

N.T. 1/23/1986 at 778-79 (emphasis added).

This Court found that testimony was false, as the letter Ms. Foulkes personally wrote on June 23, 1988, addressed to the Pennsylvania Board of Probation and Parole (Parole Board) mentioned *another agreement* between Draper and the Commonwealth – an agreement she never disclosed to anyone else.[15] During the PCRA hearing before this Court, Ms. Foulkes read aloud the following portion of that letter:

> Therefore, it is proper for you to consider the cooperation of this inmate when determining his eligibility for parole or commutation at some future date. That I provide you with the particulars of Mr. Draper's cooperation was the only benefit or promise conveyed to him in exchange for his complete truthful cooperation. I hope this information will be useful in your evaluations.

N.T. 9/20/2012 (A.M.) at 169 (emphasis added) (See Attachment P, marked as P-15 in the PCRA hearing before this Court).

The fact that Ms. Foulkes knowingly withheld evidence of an agreement with Draper and permitted him to testify falsely that there was no additional agreement contradicts her assertion before this Court that she wanted the jury to have "all the evidence." It is a reason why this Court

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[15] In Napue v. Illinois, 360 U.S. 264, 269-70 (1959), the Supreme Court of the United States expressed disapproval for a conviction supported by a lie:

> A lie is a lie, no matter what its subject, and if it is in any way relevant to the case, the district attorney has the responsibility and duty to correct what he knows to be false and elicit the truth . . That the district attorney's silence was not the result of guile or a desire to prejudice matters little, for its impact was the same, preventing, as it did, a trial that could in any real sense be termed fair.

However, this Court was without jurisdiction to consider a claim under Napue v. Illinois, 360 U.S. 259 (1959) or Giglio v. U.S., 405 U.S. 150 (1972) based on Draper's false testimony, given that the letter Ms. Foulkes addressed to the Parole Board had been in the public record since Draper filed a PCRA petition in his own case on May 10, 2000. Accordingly, appellee had failed to raise that claim with reasonable due diligence under 42 Pa.C.S. § 9545(b)(2). It is worth noting, however, that Ms. Foulkes' solicitation of false testimony on direct examination, *and* her failure to correct Draper's false testimony on cross-examination, could have been a potentially viable claim under Giglio, as non-disclosure of a promise made to a witness by the government, and subsequent testimony that there was no promise, violates a defendant's due process right to a fair trial if "the false testimony could . . in any reasonable likelihood have affected the judgment of the jury." Giglio, 405 U.S. at 154, *citing* Napue, 360 U.S. at 271.

could not avoid finding that Ms. Foulkes' testimony about being faithful to her discovery obligations was not credible, and that her conduct constituted prosecutorial "gamesmanship."

Yet another indication of Ms. Foulkes' "gamesmanship" was her decision not to provide Mr. Panarella with notice that the decedent's widow, Mrs. Mamie Norwood, was going to identify appellee as the male she had seen on her porch the day her husband went missing. Mrs. Norwood testified that she told Ms. Foulkes that she was able to identify appellee as the man she saw on June 11, 1984 at some point after the August 22, 1984 preliminary hearing. N.T. 1/14/1986 at 130. Ms. Foulkes' knowledge of Mrs. Norwood's ability to make the identification was corroborated by her handwritten notes. See Attachment R, which was not marked as an exhibit in the PCRA hearing before this Court.[16] At the time of the Norwood trial, Pa.R.Crim.P. 305(B)(1)(d)[17] stated that the following information was subject to "mandatory" disclosure: "the circumstances and results of any identification of the defendant by voice, photograph, or in-person identification." But Ms. Foulkes went ahead and asked Mrs. Norwood to make an in-court identification of appellee without ever having notified Mr. Panarella that she would be able to do so. N.T. 1/14/1986 at 103. Before the Court recessed for lunch, Mr. Panarella objected and moved for a mistrial based on a violation of the Pennsylvania Rules of Criminal Procedure.

> MR. PANARELLA: If it hasn't, then that will allow me to proceed with my cross examination. At some point, she came forward and indicated that there was a positive identification of Mr. Williams, because I cannot believe that the Assistant District Attorney would just ask that question blindly. I believe, Your Honor, that that significant event is something that would have been, should have been made available to the defense.
> THE COURT: When did you – did you know she was going to identify the defendant? Did she say that previously?
> MS. FOULKES: Well, she told me that when she saw him in Court, and when she saw him in the newspapers, that she knew that that was the same made who had been on her porch.
> THE COURT: Don't you think that is something that the defense counsel should have been apprised of?

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[16] Again, this Court cautions that, due to the hurried posture of the proceedings, neither of the parties has seen this document, although the issue of the withholding of this information was discussed at trial and on appeal.

[17] Pa.R.Crim.P. 305 was renumbered on March 1, 2000 as Pa.R.Crim.P. 573.

MS. FOULKES: Your Honor, there are a number of things that are certainly discoverable. I don't think that it, in any way, that prejudices him to know or not to know.
THE COURT: If he is entitled to it and it's part of the discovery and it is an identification of a witness, the extent of the prejudice, of course, I am not characterizing or determining but the question first is shouldn't he have been given that information? You really had a statement of a witness who was going to identify a defendant at a crucial circumstance in court, and the order was to give the defense counsel copies of all statements.
MS. FOULKES: I gave copies of all statements.
THE COURT: You had an oral statement. You are saying that an oral statement, you don't have to give him?
MS. FOULKES: I think not, obviously.

N.T. 1/14/1986 at 103-05.

During Mr. Panarella's cross-examination of Mrs. Norwood, both Mr. Panarella and the Court clarified that, after the preliminary hearing, Mrs. Norwood told Ms. Foulkes that she was able to identify appellee as the person she saw on her porch on the night of her husband's murder.

THE COURT: Did you ever tell the Assistant District Attorney or anyone that you were able to do that?
MRS. NORWOOD: Yes.
THE COURT: You may proceed.
MR. PANARELLA: When you refer to an Assistant District Attorney, and I am correct to say that you are referring to this lady here?
MRS. NORWOOD: Yes.

N.T. 1/14/1986 at 120.

MR. PANARELLA: It is only after the preliminary hearing that you apparently come forward and discuss this with the Assistant District Attorney. Is that correct?
MRS. NORWOOD: Yes.

Id. at 129.

Whether Ms. Foulkes' decision not to inform Mr. Panarella that Mrs. Norwood would identify appellee in court constituted a violation of Pa.R.Crim.P. 305(B)(1)(d) is unimportant.[18] This

[18] Mr. Panarella moved for a mistrial on the basis of Ms. Foulkes' failure to disclose Mrs. Norwood's ability to identify appellee. Judge Savitt did not consider Mrs. Norwood's statement to Ms. Foulkes to be an "identification" falling within the purview of Pa.R.Crim.P. 305(B)(1)(d). Had he considered it such, the identification would have been subject to mandatory disclosure. Instead, Judge Savitt found that this was a "substantially verbatim oral statement" falling under Pa.R.Crim.P. 305(b)(2)(i), which was subject to discretionary disclosure. On appeal from the PCRA Court's denial of appellee's petition, the Supreme Court stated that there was no indication that the identification was deliberately withheld, nor had the identification been obtained by "suggestive means or by any other means in violation of appellant's constitutional rights." Williams II, 863 A.2d at 516.

Court found that Ms. Foulkes' decision to withhold this identification from Mr. Panarella was indicative of her state of mind while prosecuting appellee, and reflected on her credibility at the PCRA hearing before this Court in light of her steadfast claim that she "didn't care" about the jury's verdict.[19] Ms. Foulkes asserted to this Court that she wanted the jury to have "all the evidence," but this Court is disheartened to say that her actions leading up to and during the Norwood trial demonstrate that she only wanted the jury to see the evidence over which she exerted control.

The last instance of Ms. Foulkes' conduct during the Norwood prosecution that this Court wants to highlight here for the sake of completeness, is that she failed to turn over a criminal complaint and an arrest warrant for a man named Andre Peterson, for having stolen Amos Norwood's credit cards and forged his signature at a jewelry store on June 13, 1984.[20] The Commonwealth did disclose to the defense a statement from Jesse Lofton in which he was asked whether he knew a man named Andre Peterson, as well as three separate statements from Maceo Waring, a jewelry store[21] clerk who sold gold chains to a man claiming to be Amos Norwood.[22] In Mr. Waring's first statement, he identified the man who produced Mr. Norwood's non-photo identification and paid for the gold chains with Mr. Norwood's credit card as Andre Peterson.[23]

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[19] Had Ms. Foulkes advised the defense in advance that Mrs. Norwood would be able to identify appellee in court, a reasonable defense attorney would likely have requested that a lineup be conducted. Commonwealth v. Sexton, 400 A.2d 1289, 1292 (Pa. 1979) (holding that a trial court cannot arbitrarily and capriciously deny a request for a lineup). Identifying someone in a lineup is much more difficult than when he is sitting alone next to defense counsel.

[20] As seen on pages one and two of Attachment F – the table of contents of the discovery packet passed by the Commonwealth on September 15, 1984 – the documents supporting Andre Peterson's arrest for theft by deception and forgery of Amos Norwood's signature were not turned over to the defense. See Attachment S, which was not marked as an exhibit in the PCRA hearing before this Court. Again, this Court cautions that, due to the hurried posture of the proceedings, neither of the parties has seen these documents. This Court did not consider this evidence in its credibility determination of Ms. Foulkes as the Court had no indication prior to its final review of the government's files that anyone but appellee had ever been a suspect regarding the purchase of the gold chains. However, coming across these documents reaffirmed the Court in its earlier determination regarding Ms. Foulkes' credibility.

[21] The jewelry store was called Walnut Solid Gold at 1312 Walnut Street, Philadelphia, PA.

[22] See Attachment L, which was marked as Exhibit C-2, item 13 in the PCRA hearing before this Court, albeit for a different reason.

[23] See Attachment T, which was marked as Exhibit C-2, item 29(s) in the PCRA hearing before this Court.

However, at trial, Ms. Foulkes called Mr. Waring to testify that it was appellee who had purchased the chains. N.T. 1/24/1986 at 933-34. This Court did not give consideration to whether Ms. Foulkes' failure to turn over the documents, which illustrated that there was probable cause to believe that Andre Peterson was the person who used Mr. Norwood's card, amounted to a violation of Pa.R.Crim.P. 305(B). Instead, it is apparent that Ms. Foulkes' failure to turn over the criminal complaint and arrest warrant for Andre Peterson is yet another instance in which the prosecutor erred on the side of not disclosing evidence that could have been favorable to appellee. It is further substantiation for this Court's finding that Ms. Foulkes' assertion that it would not have "bothered" her if the jury in the Norwood case returned a verdict of third degree murder was not credible.[24]

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[24] This Court also examined Ms. Foulkes' prosecution of appellee in the Hamilton case, and found that she exhibited a pattern of playing "fast and loose" there as well. In the Hamilton case, after she had rested and appellee testified in his defense, Ms. Foulkes attempted to introduce prison letters written by appellee to Draper as evidence of appellee's consciousness of guilt. N.T. 2/21/1985 at 13. When she did so, appellee's trial counsel – Steven Gallagher, Esquire – objected on the grounds that he had previously requested all statements made by appellee, but had not yet received such letters. Id. at 619-20. After Mr. Gallagher reiterated his strong objection, Ms. Foulkes brought up the chronology of when she got the letters, clarifying a vague statement that she made earlier that she "got it in the last week." In what appeared to be an attempt to soften the blow of having failed to disclose the letters, Ms. Foulkes clearly stated that she only received them the same week as the hearing, in late February 1985:

> MS. FOULKES: I might also point out for the record that the specific page or document that will be referred to or would be referred to in this trial I received only this past Monday. So that the record is clear on that.
> MR. GALLAGHER: What was that? You received these documents when?
> MS. FOULKES: This past Monday.
> MR. GALLAGHER: Monday of this week?
> MS. FOULKES: That's right.
> MR. GALLAGHER: That's the first time Draper turned them over to you?
> MS. FOULKES: No. That's when his father turned them over to me. He sent them to his father and his father kept them in safekeeping and then he met with the father for the first time on Monday, the Court holiday, this past week in Mr. Dixon's hospital. Mr. Dixon was in the hospital. That was for the first time.

Id. at 642-43.

However, the documents found in the government's trial file in the proceeding before this Court revealed that Ms. Foulkes had access to these letters roughly two months before the date that she told Mr. Gallagher and Judge Savitt that she had received them. Her handwritten notes indicate that during a prep session on Thursday, December 20, 1984, Draper told her that appellee had been providing him with "written alternate false stories," and "Marc will provide them to [Detectives] Cimino/McNesby next Fri." (See Attachment I, marked as P-8 in the PCRA hearing before this Court). Even if Ms. Foulkes was technically correct that she had only "received" the letters the week of the proceeding in February, her statement was a shade of the truth. Instead of being forthcoming with the Court and stating that Draper told her about appellee's letters in December, Ms. Foulkes justified not having disclosed the documents by stating that she had only received them that week. Ms. Foulkes' credibility was assessed by this Court in light of her decision to deprive the trial court of relevant facts in order to improve her chances of securing admission of evidence favorable to her case.

As the courts of this Commonwealth stated in both Moose and Thiel, prosecutorial gamesmanship may play a role in a trial court's decision to fashion an appropriate remedy. Moose, 602 A.2d at 1273-75; Thiel, 470 A.2d at 149. This Court did not find Ms. Foulkes' assertions that she "didn't care what the verdict was as long as the jury considered all the evidence" credible. Ms. Foulkes represented to this Court at the September 2012 PCRA evidentiary hearing that she did not have a "scintilla" of evidence suggesting a homosexual connection between appellee and Mr. Norwood, and that all witnesses who were asked about Mr. Norwood's homosexual impropriety "all said no." However, those representations turned out to be false, as there were documents in Ms. Foulkes' own handwriting that turned up in the government's files directly contradicting her statements that such evidence did not exist. Thus, this Court was constrained to find that Ms. Foulkes was not credible, and that she suppressed evidence which strengthened the inference that appellee had been the victim of Mr. Norwood's sexual advances. As such, Ms. Foulkes' conduct as the trial prosecutor in the Norwood case would properly be labeled "gamesmanship."

(FN cont'd...) Just as Ms. Foulkes took questionable measures to help her case for the admissibility of the prison letters, it appears as though she employed a questionable tactic in preventing evidence favorable to appellee from being presented to the jury. Ms. Foulkes admitted to this Court that, during the Hamilton case, she sent Detectives John Cimino and James McNesby to talk to a potential defense witness, Gregory Lowe, before he was to take the stand. N.T. 9/20/2012 (P.M.) at 136-37. Mr. Lowe testified at the September 9, 1990 PCHA Hearing before Judge Sabo that Draper had told him in prison that he got Herbert Hamilton's keys from appellee, went to Hamilton's apartment and stabbed him in the neck after appellee had assaulted Hamilton. N.T. 9/10/1990 at 16. Mr. Lowe explained that he did not proffer that testimony at appellee's trial in the Hamilton case because the detectives told him that if he testified for appellee, "I can kiss my deal out, you know, kiss it down the river." Id. at 19. When questioned by this Court about her involvement regarding Mr. Lowe's decision not to testify, Ms. Foulkes denied playing a role. This Court did not accept Ms. Foulkes' testimony on that point, and considered her decision to send the detectives to speak with Mr. Lowe as an indication that she wanted to secure a first degree murder conviction in that Hamilton case and not, as she testified to this Court, that she "was not disappointed in the verdict" of third degree murder. N.T. 9/20/2012 (A.M.) at 79. Ms. Foulkes maintained a tight and careful control over all aspects of the evidence.

IN THE SUPREME COURT OF PENNSYLVANIA
EASTERN DISTRICT

COMMONWEALTH OF PENNSYLVANIA,	:	No. 183 EM 2012, 560 CAP
	:	
Petitioner	:	Emergency Commonwealth Application
	:	under Pa.R.A.P. 1702(d) & 3316 to
v.	:	Review Order Staying Execution
	:	
	:	
TERRENCE WILLIAMS,	:	
	:	
Respondent	:	

ORDER

PER CURIAM

AND NOW, this 3rd day of October, 2012, the Commonwealth's application for emergency relief is hereby **DENIED**. The Prothonotary is directed to set a briefing schedule.

A True Copy
As of 10/3/2012

Attest: [signature]
John W. Shaffer Jr., Esquire
Deputy Prothonotary
Supreme Court of Pennsylvania

IN THE SUPREME COURT OF PENNSYLVANIA
EASTERN DISTRICT

COMMONWEALTH OF PENNSYLVANIA,	:	No. 163 EM 2012
Petitioner	:	
	:	Respondent's Motion for Recusal of Chief Justice Castille
v.	:	
TERRANCE WILLIAMS,	:	
Respondent	:	

ORDER

AND NOW, this 1st day of October 2012, Respondent's Motion for Recusal is **DENIED**, as is the request for referral to the full Court.

Ronald D. Castille
Chief Justice Ronald D. Castille

A True Copy
As Of 10/1/2012

Attest: [signature]
Patricia A. [illegible]
Chief Clerk
Supreme Court of Pennsylvania

PHILADELPHIA COURT OF COMMON PLEAS
CRIMINAL TRIAL DIVISION

COMMONWEALTH	:	
	:	**CP-51-CR-0823621-1984**
v.	:	
	:	
TERRANCE WILLIAMS	:	
Sarmina, J.		

ORDER

AND NOW, this 28th day of September, 2012, it is ORDERED that the stay of execution is GRANTED and a new penalty phase is ORDERED.

ADA: R. Godfrey/R. Eisenberg/K. Mahler ATTY: B. Nolas/S. Nolan STENO: L. Amatucci CLERK: B. Dirscherl

BY THE COURT:

M. Teresa Sarmina
M. Teresa Sarmina

MEMORANDUM

CITY OF PHILADELPH

DATE 1/21/86

: MARK GOTTLIEB, Chief, Homicide Unit

OM : ANDREA G. FOULKES, Assistant District Attorney, Homicide Unit AGF

BJECT: COMMONWEALTH V. TERRANCE WILLIAMS, CP #84-08-2362-2367

In the event the jury in the above-referenced case currently on trial, returns a verdict of Murder I, I request that we actively seek the death penalty.

In the instant case, the defendant, along with a co-defendant Marc Draper who is testifying for the Commonwealth in exchange for a plea to Murder II, Robbery & Conspiracy, abducted Amos Norwood, 56 years, chemist and resident of Mt. Airy, to the Ivy Hill Cemetary on the pretext of obtaining a ride home. There they forced him into the cemetary, tied him with his clothes, robbed him of money, credit cards, keys, etc. and Williams went back to the car to obtain a tire iron and a socket wrench. Upon his return to the bound and denuded victim he and Marc Draper proceeded to beat Amos Norwood about the head numerous times until he was dead. After taking Marc Draper to work in Norwood's car, defendant returned with gasoline and burned the body, hidden between the gravestones to avoid its identification. Defendant obtained over $200 and purchased gold necklaces with Norwood's credit card. Thus, the first aggravating circumstance is that the case is a felony-murder which rises to Murder in the First Degree.

The defendant has been previously convicted of two serious felonies involving violence to another person:

1. In December, 1982, defendant and one Lucius Larke burglarized the residence of Don and Hilda Dorfman, both in their late 60's, in Mt. Airy, put a .22 caliber rifle to Mrs. Dorfman's head and demanded money as the terrified couple remained in bed. They ransacked the house, taking thousands of dollars worth of property. Defendant was convicted by Judge Michael Wallace and sentenced to 12½ to 25 years in prison.
2. In January, 1984, defendant was invited into the residence of Herbert Hamilton, age 50, in West Philadelphia. The victim was homosexual and Williams proceeded to get into bed with the victim concealing a knife. As Williams

[redacted]

(Rev. 2/59) RESPONSE TO THIS MEMORANDUM MAY BE MADE HEREON IN LONGHAND

tried to stab Hamilton a fight ensued and Williams knocked out Hamilton with a baseball bat and then stabbed him numerous times in the back and left the knife lodged in his neck. Kerosene and numerous spent matches were found around the body but no fire was actually started. Defendant took some property from the deceased's apartment after the killing. Defendant was found guilty by a jury of Murder III and PIC and Theft and sentenced by Judge Sabo to 13½ to 27 years consecutive to any other sentence.

The defendant is currently awaiting trial on the robbery of Mr. Robert Hill, a friend of Herbert Hamilton. Marc Draper is his co-defendant in that case as well.

In mitigation, defendant is 19 years old and went through one year of college at Cheney University. At Germantown High School, he was reputed to be a promising quarterback and his team won the City championship. He has been described by persons who know him as a Jeckyl-Hyde personality.

Please advise.

/ktm Rec'd. I reviewed case with Ronth M. Gottlieb 1/22/86

cc: file

Mark,
Approved to proceed on the Death Penalty.
Ronald D. Castille